

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 VICTORI A SHAEV,

4 Plaintiff,

5 v.

24 Civ. 5859 (AS)
Order to Show Cause

6 NETSCOUT SYSTEMS, INC., ET AL,

7
8 Defendants.
-----x

New York, N.Y.
August 19, 2024
1:00 p.m.

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10
11 Before:

12 HON. ARUN SUBRAMANIAN,

13 District Judge

14 APPEARANCES

15 BARRACK RODOS & BACINE
Attorneys for Plaintiff

16 BY: A. ARNOLD GERSHON
MICHAEL TOOMEY

17 JENNER & BLOCK
18 Attorney for Defendants
19 BY: STEPHEN ASCHER
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1 (In open court; case called)

2 DEPUTY CLERK: Can the parties starting with counsel
3 for the plaintiff please state their appearances for the
4 record.

5 MR. GERSHON: May it please the Court, my name is
6 Arnold Gershon. With me is Mike Toomey, Michael Toomey. We
7 are partners at Barrack Rodos & Bacine, and we represent the
8 plaintiff Victoria Shaev in this case.

9 THE COURT: Good afternoon.

10 MR. ASCHER: Good afternoon, your Honor.

11 THE COURT: Do we have any one here for Netscout.

12 MR. ASCHER: Yes, your Honor. My name is Stephen
13 Ascher from Jenner & Block, and we represent Netscout and the
14 directors.

15 THE COURT: Good afternoon, and welcome. I don't --
16 you may not have had a chance to put in your appearances yet.
17 I assume you're going to do that shortly. It may have come in
18 today.

19 MR. GERSHON: We signed the sign in sheet, your Honor.
20 Is that sufficient?

21 THE COURT: No. It's all sufficient. I'm just saying
22 for purposes of the docket, Mr. Ascher, have you already
23 entered the proceedings formally?

24 MR. ASCHER: Not yet, no, your Honor.

25 THE COURT: But you plan to do so?

1 MR. ASCHER: Yes.

2 THE COURT: And if I am reminded, I did in fact adopt
3 the proposed briefing schedule on the request for emergency
4 relief. Mr. Ascher you got that schedule, I will obviously
5 hear you if there needs to be adjustments to that schedule.

6 MR. ASCHER: I did see the order, yes, your Honor.
7 Thank you.

8 MR. GERSHON: Your Honor, may I be heard on one point?
9 In our letter requesting a briefing schedule, we included a
10 typo. We said July 28 instead of August 28. I don't know
11 whether anybody noticed it or not. We didn't until too late to
12 fix it.

13 THE COURT: Since I adopted the proposed schedule, I
14 didn't notice it either, which is fine. We will put it in
15 order with the correct dates just so everything is squared
16 away, unless, Mr. Ascher, you have any responses or need any
17 modification, which are fine with me.

18 Just as a technical matter -- let's first --
19 Mr. Ascher, I'm putting you in an unfair spot because you just
20 entered this case and you just received these papers. But
21 anything you'd would want to communicate to the Court before --
22 I have some questions that I would love the parties to chime in
23 on, but I'll hear you first.

24 MR. ASCHER: Thank you, your Honor. And not unfair.
25 I hope to be prepared.

1 I think the main thing that your Honor should know is
2 that although we think that there was no obligation to do so,
3 Netscout has already filed a proxy supplement disclosing
4 precisely the information requested in the complaint.

5 THE COURT: The assumptions underlying the Monte Carlo
6 simulation.

7 MR. ASCHER: Correct, that's exactly what we filed in
8 a proxy supplement last Thursday. So it is our position that
9 the case itself is moot, and the only outstanding issue is that
10 the plaintiffs are demanding a mootness fee for bringing this
11 to Netscout's attention. Netscout believes that the
12 disclosures sought by the plaintiff were immaterial. It's a
13 very technical reading of the statute, and we've agreed to --
14 no doubt we've agreed to make a disclosure in order to moot the
15 issue, but --

16 THE COURT: You mean it's a technical reading of the
17 instruction underlying the regulation implemented in accordance
18 with the statute? There's nothing in the statute that requires
19 any of this, right?

20 MR. ASCHER: Correct. This isn't an SEC reg. S-K item
21 402(d).

22 THE COURT: Do you believe that there would be an
23 actionable claim based on the non-inclusion of the underlying
24 assumptions based on the language of the regulation and
25 everything else?

1 MR. ASCHER: We don't believe it was material, so we
2 recognize that that there was an issue as to whether the
3 information should have been disclosed, and so we are not -- we
4 are not contesting the issue as to whether under the rule it
5 should have been disclosed. What we do have a significant
6 question about is materiality. We decided to moot that also by
7 making the disclosure. And so now really, your Honor, the only
8 issue is whether there's any authority for them to receive some
9 sort of fee for bringing like this to our attention.

10 I can explain, your Honor, if it would be helpful why
11 the disclosed information is so immaterial if you're interested
12 in hearing about that today. That's starting to get more into
13 the weeds, but I'm prepared to do that.

14 THE COURT: No, I'm happy for that to be briefed. I
15 do have a separate question, which is, do the normal
16 requirements that would apply concerning loss causation apply
17 in this context despite the fact that the principal relief
18 sought is in the form of injunctive relief? And then I'll hear
19 everyone on this. But, obviously, there's the *Rubenstein* case
20 in the Second Circuit which relates to some of these issues.
21 There are also authorities in this district and also in
22 California that make clear that there is pleading requirement
23 of loss causation even in the context of a request for
24 injunctive relief. And, Mr. Ascher, you can say I have no
25 view, I need to phone a friend, or whatever want to say, but if

1 you have any views on any of those issues, I'm just curious
2 because I did look through the papers and with the able
3 assistance of my law clerk did some research over the weekend,
4 and so I was just curious about those issues.

5 MR. ASCHER: I understand, your Honor. So we have not
6 focused on the issue of loss causation, the reason being that
7 we decide to the moot the issues --

8 THE COURT: Yes, you just said you were going to
9 moot--

10 MR. ASCER: -- and make disclosure. So from our
11 perspective, the primary issue, which, frankly, I think might
12 be undisputed, but maybe I'll hear differently. Let me explain
13 why I think it should be undisputed, also, your Honor, that
14 we've mooted this case. The same plaintiff's lawyers filed
15 essentially the same complaint against another public company
16 several weeks earlier seeking precisely the same types of
17 disclosures. That company made exactly the same disclosures
18 that -- obviously, the numbers are different, but exactly the
19 same format of disclosures that Netscout made last week, and
20 these plaintiffs admitted that those disclosures mooted that
21 case and filed a voluntary stipulation of discontinuance in
22 that case. And so my belief, your Honor, is that the only
23 difference between this case and that case is that that issuer
24 agreed to pay some sort of a fee to the plaintiff and
25 plaintiff's counsel and my client has not. So I think it is

1 really is indisputable that this issue has been mooted, and I
2 think it's going to be very difficult for the plaintiff to take
3 a contrary view. Now, we may be briefing the issue of a
4 mootness fee, your Honor, and --

5 THE COURT: That's something that I have to approve?
6 I've never run into the issue of a mootness fee before.

7 MR. ASCHER: Sure. So I can give some background on
8 that, your Honor.

9 There is quite a decent amount of case law, both in
10 the Delaware courts and to a lesser extent in the Southern
11 District about whether and to what extent a plaintiff's law
12 firm is entitled to be paid their attorneys' fees, in essence,
13 by a corporation when they bring a disclosure case. And
14 typically that occurs, your Honor, in M&A cases in Delaware.
15 There's, frankly, a whole industry around this. If two
16 corporations enter into a M&A transaction, there is almost
17 inevitably a series of disclosure cases filed by the
18 plaintiffs' securities bar saying that in your papers in the
19 various securities filing concerning a merger or spinoff or
20 whatever it is, you have disclosed this thing, you should have
21 disclosed that thing. And, historically, public companies
22 would make those disclosures and agree to pay mootness fees.
23 Sometimes they'd be a few hundred thousand dollars. Sometimes
24 they'd be \$50,000, whatever.

25 In the last few years, the Delaware courts have

1 started clamping down on those mootness fees. People have seen
2 these cases as, you know, a form of strike suit and, if you
3 will, a transaction tax whenever a public company tries to
4 enter into something, and so there have been a couple of major
5 cases coming out of Delaware in the last few years denying
6 these fees to plaintiffs when the disclosures that their cases
7 triggered were found to be immaterial and not to have provided
8 the key words are "a substantial benefit" to the company and
9 its shareholders.

10 There have also been a couple recent cases in the
11 Southern District on this, your Honor. Judge Abrams and Judge
12 Oetken have both recently issued decisions saying, you know,
13 all well and good that you filed a case that caused a company
14 to make some more disclosures, but really these disclosures
15 were so insignificant, no fee should be payable. So I think
16 that's the only issue that's left to be briefed, your Honor. I
17 don't think it necessarily needs to be on the same timetable.
18 but that's where we are.

19 THE COURT: Okay. Understood. I will turn to the
20 plaintiff, Mr. Gershon, or Mr. Toomey. And I apologize that I
21 started with Mr. Ascher, but given that they had not put in
22 anything in response to your pleading, I hope you'll be okay
23 that I started with Mr. Ascher.

24 MR. GERSHON: Perfectly okay with it.

25 My name is Arnold Gershon from Barrack Rodos & Bacine

1 representing the plaintiff Victoria Shaev.

2 Where to start? Would your Honor prefer to start on
3 the subject of loss causation or is that not part of the case
4 at this time?

5 THE COURT: Well, you tell me if it's part of the case
6 anymore.

7 MR. GERSHON: I don't think it's part of the case, but
8 we do have loss causation in the sense that the plan if
9 approved would result in serious costs to the company, and,
10 furthermore, on the subject of the election of directors, we
11 submit that there is no need to show loss causation in such a
12 case because the statutory codification of this judge-made rule
13 says that you must show loss causation when there is a loss for
14 which you seek damages, and there are obviously no damages to
15 be sought based on the election of directors. That's part of
16 the Private Securities Litigation Reform Act.

17 THE COURT: Is there any case that espouses that view?

18 MR. GERSHON: No, your Honor.

19 THE COURT: Okay. Appreciate your candor.

20 MR. GERSHON: There are no cases that have actually
21 come up that have addressed that even though the statute --

22 THE COURT: On the appellate level. You will agree
23 that there are district court cases that have held that even if
24 a case seeking solely injunctive relief, the loss causation
25 pleading requirements still pertains.

1 MR. GERSHON: Yes. And we submit that we have shown
2 loss causation and that, in any event, to the extent that the
3 company is seeking approval of a stock incentive plan, but to
4 the extent that it's seeking election of directors, we submit
5 under the statute, I think it's 15 U.S.C. 78U-4(b), 2(b) or
6 3(b), something like that, is where that statutory language
7 appears.

8 THE COURT: But you will agree with me that just at
9 least on say-on-pay vote, that as to that *Rubenstein* is all but
10 dispositive. Do you have a way around *Rubenstein* given what it
11 says?

12 MR. GERSHON: We submit that the same applies in this
13 instance, and that *Rubenstein* is, of course, a summary order
14 which is entitled to great respect, but it is not the last word
15 on the subject, and there is no case in the Second Circuit or
16 anywhere that we have been able to find that provides the last
17 word on that subject when considered in light of the statutory
18 codification of this rule that was initially laid down by Judge
19 Oakes 40 years ago or 50 years ago, whenever he did it.

20 THE COURT: Let's put that to the side. Let's
21 assume -- let's put that issue to the side for the most.
22 Mr. Ascher said, look, they've made these changes -- I'm not
23 holding you to this, but at the present time, do you have any
24 reason to disagree with Mr. Ascher that the case is moot, and
25 the only issue left is the issue of mootness fees? If you're

1 still thinking about it, that's fine, but I'm just trying to
2 figure out kind of where we're at.

3 MR. GERSHON: We disagree, your Honor, and for this
4 reason: The case that he cites was a case that was settled.
5 Instead of litigating it to the hilt, we decided to settle it.
6 This case apparently we cannot settle. And here's what's wrong
7 with that supplemental proxy statement. It states the
8 assumptions only for the year fiscal 2024 but the regulations
9 clearly requires that it's stated for all three years that are
10 shown in summary compensation table, which is '24, '23 and '22,
11 and these are regulations of the SEC. And it might address the
12 case of *Loper Bright V. Raimondo* **where the court held that**
13 **where the Congress expressly delegates rule-making authority to**
14 **define terms to the agency, that must be given respect by the**
15 **court and in** *Loper* it cited *Batterton v. Francis*, which is an
16 earlier Supreme Court case, which held that the SEC's proxy
17 rules have the force and effect of law. Accordingly, we
18 suggest that --

19 THE COURT: Well, let me ask maybe a more basic
20 question. Look, we are here on not even a motion. We are here
21 on a proposed order to show cause for emergency relief. I
22 guess my question is, is there still an emergency? Because I
23 understand what you're saying about the earlier years. As I
24 understand it, you're saying as to 2024, maybe they've
25 corrected that. I'm sure Mr. Ascher can put in a supplement

1 that would address these prior years too.

2 My real question is, can I deny -- there's nothing for
3 me to deny. There's no motion filed, but do we still have an
4 emergency here, or should we have a more relaxed and normal
5 briefing process on what remains of your case? Help me out
6 with that.

7 MR. GERSHON: The plaintiff will suffer irreparable
8 injury if they go forward with the vote, and then we have to
9 litigate whether the vote was fairly obtained. The Second
10 Circuit in *Koppel v. 4987 Corp.*, which is cited in our brief,
11 said that they must prefer issues like this be resolved before
12 the vote is taken rather than to wait until after so that
13 plaintiff's lawyers don't have the chance to litigate forever
14 and build up big fees. We have the exact same interest. We
15 are trying to avoid protracted litigation.

16 THE COURT: Connect the dots for me. I get it. So
17 what bearing do the 2022 and 2023 underlying assumptions have
18 on the pending vote that's going to occur in September?

19 MR. GERSHON: They are required by the regulations of
20 the Securities and Exchange Commission in two cases, the Second
21 Circuit has held that where the SEC has express requirements
22 that certain information be disclosed, the failure to include
23 those disclosures is actionable. That's *Seinfeld v. Gray* and
24 *Resnik v. Swartz* that are cited n our memorandum of law and
25 support.

1 THE COURT: But just like, you know, speak to me like
2 I'm a five year old. Like, what does it matter? Like, why
3 does it matter, like these disclosures about the underlying
4 assumptions on the Monte Carlo simulation for 2022 and 2023,
5 how does that -- just if you're speaking to like someone on the
6 elevator, like why does it matter for the purposes of this
7 vote? I'm not saying it doesn't like legally matter for the
8 reasons you're saying. I'm just saying like if you're in the
9 elevator going down. Go ahead.

10 MR. GERSHON: I'm about to address that. Judge Cote
11 held in the case of 2006 called *Unite Here v. Cintas*, the
12 uniform company. Cintas is C-I-N-T-A-S. Held that these
13 regulations requiring the disclosures concerning the
14 compensation of the executive officers are material because
15 they bear on the independence of the directors who are either
16 up for election or who have authorized this plan and therefore
17 they are material.

18 THE COURT: If their compensation was through the
19 roof, that's a reason to question their independence and
20 whether they are good stewards of the company.

21 MR. GERSHON: She held that they were material, and if
22 I may address the subject of the assumptions. The assumptions
23 to be disclosed are the volatility and the interest rate and
24 what we know is that the greater those numbers are for the
25 volatility and the interest rate, the greater the cost of the

1 compensation.

2 Now, one thing I might point out, the next out
3 supplemental proxy statement shows that the grant date fair
4 value is less than the price of the underlying stock on the
5 date of grant. That should not be. It should normally be
6 higher, and we can offer up the statements of Radford, the
7 premier company that does Monte Carlo simulations to show that
8 very fact. And the fact that they are less shows that
9 something is wrong.

10 Now, what could be wrong? I expect my friend to say
11 that there is no upside potential to these restricted stock
12 performance stock unit awards, but that is not supported by the
13 proxy statement itself which makes an ambiguous statement. On
14 one hand, it says the threshold and the maximum are the same,
15 but if you look at the grant date table, it shows no number is
16 entered for the maximum possible recovery. And in that
17 situation, the presumption is that there is no maximum. And so
18 therefore they have to fix this supplemental proxy statement
19 with an explanation of why the grant date fair value is less
20 than the price of the underlying stock on the date of grant.
21 And to the extent that they might say that it's part of the
22 structure of the award, in fact we don't know what the
23 structure of the award is because the 2024 form 10K shows as an
24 exhibit the underlying plan, the 2019 stock incentive plan, it
25 shows the form of a award of a regular time-based restricted

1 stock unit, but it does not include the award for a
2 performance-based restricted stock unit, and, therefore, we
3 submit that the supplemental proxy statement is incomplete,
4 inconsistent with the requirements of the regulations of the
5 SEC and inconsistent with the ability to give the information
6 that the stockholders need to determine what the value of these
7 awards -- what the cost of the company of these awards is, the
8 cost is expressed as grant date fair value.

9 THE COURT: Okay. You're not trying to hide anything
10 from Mr. Ascher, right? All these things you think are
11 missing, like you want to help the company so you want them to
12 put in these supplements and just resolve this, right?

13 MR. GERSHON: We suggest that they should put in a
14 supplement for the three years, and that they should explain in
15 greater detail what assumptions they made that caused the grant
16 date fair value to be less than the price of the stock on the
17 date of grant.

18 THE COURT: That's it? If they make those changes,
19 then victory is yours.

20 MR. GERSHON: Yes, your Honor.

21 THE COURT: All right. Mr. Ascher, you got any more
22 questions about what they want in the proposed proxy
23 supplement?

24 MR. ASCHER: I don't have more questions, your Honor.
25 I do have some answers if you have the patience for a little

1 bit more.

2 THE COURT: Sure. Hold on one second. Mr. Gershon,
3 one question. Based on your experience in this, would the moot
4 any fee you were paid if there is a dispute about that, that
5 that becomes an issue for the Court to decide, am I right about
6 that?

7 MR. GERSHON: Oh, that. In Delaware, the court wants
8 to take a look at it, and I don't know whether they want to
9 approve it, but they want to see it. In the federal courts,
10 it's unclear. Some years ago we had a case before Judge Sue
11 Robinson in the District of Delaware, and my learned friend in
12 that case was Judge Lewis Liman, now a judge in this court, and
13 we told Judge Robinson that we had a mootness fee, and if she
14 wanted to disclose it, we would tell her what it is. She said,
15 "Don't bother me with the details. Go on about your business."

16 On the other hand, Judge Weinstein said, "I want to
17 look at what that fee is. And if it's okay, I'll approve it."
18 And we told him what the fee was in that case, and he signed
19 off on the order without any further elaboration.

20 So I think your Honor has discretion --

21 THE COURT: In your view, is there any rule or
22 regulation or statute that requires judicial authorization of
23 these fees?

24 MR. GERSHON: We are aware of no such rule, your
25 Honor.

1 THE COURT: Okay. Let's just say for the moment that
2 Mr. Ascher says, we've mooted this case because we've done
3 everything that even arguably needs to be done to resolve this
4 case. However, we are not going to pay you any kind of
5 mootness fee. At that point, what remaining claim would you
6 have to advance in this case? Would it just be a pure
7 attorneys' fees case?

8 MR. GERSHON: As Judge Weinstein said, you can then
9 make a motion for a fee, but I hope you'll settle it and save
10 us all the trouble.

11 THE COURT: I'm wondering what the motion is. The
12 motion is just for attorneys' fees?

13 MR. GERSHON: That would be yes, under rule whatever,
14 it is 56 something or other.

15 THE COURT: All right. Mr. Ascher, any responses?

16 ASCHER: Yes. Thank you, your Honor. A few things.

17 First of all, I did want to respond to your elevator
18 speech question from the other perspective, of course, about
19 why these disclosures are not material, right?

20 So as Mr. Gershon explained, they are seeking the
21 assumptions used to calculate a fair value. But there is no
22 dispute here Netscout always disclosed the fair value itself,
23 right? That headline number was always disclosed to its
24 shareholders. So all they're asking for is: Give us the
25 numbers that you used to calculate the thing that you already

1 disclosed. So all they're asking like is if somebody has a
2 computer at home that they could plug those numbers in and
3 check that our math is correct. That's the level of disclosure
4 that they're asking for. There is no question that we
5 accurately disclosed the number of shares that were paid to
6 these executives. There is no suggestion at this point that it
7 was calculated inaccurately. I'll get to one issue about that
8 later. This is literally just: Show me your math, on an issue
9 that itself is subsidiary.

10 THE COURT: Just help me out with this. Anybody, like
11 if I knew how to run Monte Carlo simulations, like I can do all
12 of this based on the inputs, right?

13 MR. ASCHER: Yes.

14 THE COURT: It's like a publicly traded company. I
15 know the stock. I can figure out like interest rate
16 assumptions. I can make my own assumptions, run a simulation
17 and figure out what I think the fair value would be, right?
18 There's nothing like secret about it. It's just that you had
19 to run the simulation to get to a fair value. You ran the
20 simulation. You said what the fair value is. Everyone knows
21 you ran a Monte Carlo simulation, so they thought, well, maybe
22 these folks are up to no good. They could just run it
23 themselves and then figure out that it's some different number.
24 Because you're not trying to say that you came up with the fair
25 value through some other means. Like at the point that you say

1 like here is how we did it, and we made assumptions about these
2 various things, then that opens it up to anybody who might
3 disagree with that to just do it themselves if they wanted to.
4 Is there anything I'm missing in that?

5 MR. ASCHER: No, your Honor. That's probably a good
6 segue to the second point between the three-year disclosure
7 that they're still seeking and the one-year disclosure that
8 we've already made. There are a few answers to that, your
9 Honor. First of all, as I've already pointed out, they've
10 already agreed to moot the case on the same basis.

11 THE COURT: What's the cost involved for doing it for
12 an extra two years, because you've already done it for 2024. I
13 mean, maybe there's some different numbers in there, but like--

14 MR. ASCHER: I don't know that there's a cost, but the
15 second point, your Honor, is we do read the statute
16 differently. There are some things that are required to be
17 disclosed for three years and others for one year, and our read
18 of item 402(d) is that this is a one-year piece.

19 And then the final point to be made on that, your
20 Honor, all of this has to be material for us to be required to
21 disclose it, right? And so the 2024 figure that we've already
22 disclosed, that allows somebody to verify our calculation.
23 What point is there in giving someone information to go back
24 and verify calculations for 2022 and 2023? That compensation
25 has already been paid. The company has already given it to

1 those executives. It's over and done with. So we've given the
2 stockholders the information that they need for 2024. We do
3 maintain, your Honor, that that is exactly what the statute
4 requires, and certainly anything more would be immaterial.

5 The two other points I wanted to make, your Honor,
6 Mr. Gershon expressed some confusion as to why the fair value
7 that the company has reported is not higher. We have explained
8 that to him. I thought he understood it before I talked into
9 the room today. I think they are misreading. I think they are
10 just misreading the materials.

11 The reason it's not higher is Netscout's compensation
12 plan is a little bit different than some other companies. Some
13 companies have it sort of a two-way ratchet, meaning if the
14 company's performance is above certain thresholds, the amount
15 of stock goes up. If it's below certain thresholds, it goes
16 down. That's how it often work. Therefore, the value can be
17 either more or less than the current stock price.

18 Netscout's a one-way ratchet down, meaning they're
19 presumptively going to get a certain amount of stock, but if
20 they don't hit certain benchmarks, it goes down. Because of
21 that, the valuation is lower than a two-way ratchet where
22 you've got a chance of going up or down. So I thought we were
23 all clear on that.

24 THE COURT: Am I right that you basically gave sort of
25 the max value, and so the only thing that could happen is it

1 can be less?

2 MR. ASCHER: Yes.

3 THE COURT: And it can't be more.

4 MR. ASCHER: Yes. And that is all disclosed, your
5 Honor. It's not the easiest thing to understand, but it's all
6 disclosed.

7 Finally, your Honor, on the whole fee request issue,
8 Mr. Gershon did cite a couple of cases where federal judges,
9 including Judge Weinstein, have said, "Pay the fee and leave me
10 alone." I understand that. Those cases are kind of ancient
11 history in the world of mootness fees. The Delaware courts in
12 the first instance, and now the Southern District, have really
13 taken a different look at them. The Judge Abrams case and
14 Judge Oetken case that I mentioned are both much more recent
15 cases. There has been a recognition, as I said before this is
16 a transition tax on public companies, and it's a tax that
17 shouldn't be paid unless the disclosures are truly material and
18 provide a substantial benefit to the shareholders.

19 THE COURT: I'm just trying to fit that into not
20 issuing advisory opinions because the folks upstairs told me
21 that I'm not supposed to do that. So like what rule or
22 regulation does this fall under? Let's assume Netscout says,
23 "No dice. We're not playing this game. We're not paying you
24 any mootness fees." And then Mr. Gershon comes in here and he
25 asks me for something, what does that come under?

1 MR. ASCHER: I think that's the -- that is a good
2 question, your Honor. In Delaware M&A cases, the Delaware
3 courts have said that when the plaintiff causes, brings about a
4 substantial benefit to other shareholders, the plaintiffs'
5 lawyers are entitled to a fee. I think there is a substantial
6 question as to whether that doctrine, which I see as a creature
7 of Delaware law is applicable --

8 THE COURT: It's litigated in a Delaware court.
9 That's what I understood too.

10 MR. ASCHER: Yes. And I want to caution, your Honor.
11 I haven't fully researched this issue.

12 THE COURT: Okay.

13 MR. ASCHER: But there is a question in my mind as to
14 whether that doctrine would apply in a federal securities case.

15 THE COURT: Okay. Understood.

16 Well, this has been very helpful. We have a briefing
17 schedule, but based on what I have heard today, my
18 understanding is that within the next nine days the parties are
19 going to be working hard to see if they can resolve this case
20 so that we don't have to continue with any further briefing
21 given the substantial progress that both sides have made
22 already and hopefully we've advanced the ball through the
23 discussion today. If not, I suppose we will have a response to
24 the proposed order to show cause on August 28. So we will put
25 that in an order.

1 Mr. Gershon, I think I have raised with you some of
2 the questions I had about loss causation, whether that applies
3 here. I have to say I do have a substantial question, and
4 Mr. Ascher has picked this up on the materiality requirement in
5 this context given the facts and circumstances involved, and
6 the overhang, of course, is we have this issue of mootness
7 given the supplemental proxy statement. So it may be that you
8 will have discussions with Mr. Ascher and will decide that this
9 is not -- you have many causes potentially involving serious
10 materially misleading disclosures or omitted information, but
11 maybe this isn't it. Maybe you'll tell me no, Judge, that's
12 not the case. There is a materially misleading disclosure in
13 this case, which I'm happy to hear your briefing. In any
14 event, do your best over the next week or so to see if this can
15 be resolved in a way that would not require this kind of
16 expedited briefing which the Court never likes to be in a
17 situation, unless it's necessary, to put people on short
18 timetables, especially when there are important and novel and
19 complicated legal issues to be of resolved. You understand
20 that, right?

21 MR. GERSHON: Very well. Yes, I do, your Honor.

22 THE COURT: Anything further from either side?

23 Mr. Gershon, anything further from you?

24 MR. GERSHON: Oh, we would be briefing this if we had
25 to, but I just wanted to draw one distinction between the

1 merger cases and the instant cases. The merger cases do not
2 involve disclosures that are specifically required by any
3 agency or any government: Not the state of Delaware, not the
4 United States Securities and Exchange Commission, nobody
5 specifically requires these. And in the two cases cited in our
6 brief mentioned *Reznik v. Schwartz* and *Seinfeld v. Gray*, the
7 courts held that a disclosure is required either in one of two
8 circumstances to be material: One is if it's required to make
9 other disclosures not misleading or, two, if it is specifically
10 required that a regulations and rules of the Securities and
11 Exchange Commission, and we submit that this falls directly,
12 exactly, precisely within those two cases.

13 THE COURT: Okay. So after you roll up your sleeve
14 and over the next week try to resolve this, then you are going
15 to see Mr. Ascher's response to all of that, and then you will
16 have a chance to reply.

17 MR. GERSHON: Yes.

18 THE COURT: Good.

19 Mr. Ascher, anything further on your end?

20 MR. ASCHER: No, your Honor. I don't know whether the
21 PSLRA applies to this case. We will be looking at the attorney
22 fee shifting of that provision to see if it applies, but we
23 will submit our papers if we can't resolve it.

24 THE COURT: Okay. I think he was talking to you,
25 Mr. Gershon, in that last comment, but, you know, that's fine.

1 Mr. Ascher, could you do me a favor? Could you send
2 an email to chambers, copying plaintiff's counsel, of course,
3 and just give me the citations of those two cases, the Oetken
4 and Abrams case that you had mentioned that sort of address
5 this issue? I'm curious and would like to take a look.

6 MR. ASCHER: Absolutely, your Honor.

7 THE COURT: All right. Anything further from either
8 side?

9 MR. GERSHON: No, your Honor.

10 THE COURT: Good look over the next week. I know you
11 will have many fruitful discussions with each other in an
12 earnest attempt to resolve this. If not, we will continue with
13 the briefing. I think the one homework assignment on our end
14 is to put in an order with the correct dates, so thank you for
15 advising me about the typo in the letter, which we then
16 replicated in our order.

17 Thank you very much. We are adjourned.

18 (Adjourned)